



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FCP/156011

PRELIMINARY RECITALS

Pursuant to a petition filed March 12, 2014, under Wis. Admin. Code §DHS 10.55, to review a decision by the Milwaukee Enrollment Services in regard to Medical Assistance (MA), a telephonic hearing was held on April 17, 2014.

The issue for determination is whether expenses for monthly neuromuscular massage incurred by the petitioner should be allowed as a deduction from her income as remedial expenses for the purpose of determining her cost share liability for the Family Care program (FCP).

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

█
█

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: Chris Sobczak, HSPC
Milwaukee Enrollment Services
1220 W Vliet St, Room 106
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County and a participant in the FCP.
2. On October 23, 2013 the agency issued a notice to petitioner advising her that her cost share for the FCP was going to increase effective November 1, 2013.
3. On December 9, 2013 the agency issued a notice to petitioner advising her that her cost share for the FCP was going to increase effective January 1, 2014.
4. Petitioner pays \$320 monthly for neuromuscular massage. She is 68 years old and diagnosed with multiple sclerosis.

DISCUSSION

The Family Care program, which is supervised by the Department of Health Services, is designed to provide appropriate long-term care services for elderly or disabled adults. It is authorized under Wisconsin Statutes, §46.286, and is described comprehensively in the Wisconsin Administrative Code, Chapter DHS 10. See also, *Medicaid Eligibility Handbook* at §29.1 et seq., available at <http://www.emhandbooks.wisconsin.gov/meh-ebd/meh.htm>.

In this case, the petitioner has been found eligible for FCP and is considered a Group B member. Group B status is available to a person who has gross income below the Community Waivers MA income limit of \$2,163. *MEH*, §39.4.1. A Group B recipient may have health insurance premiums, certain medical/remedial expenses and a Personal Maintenance Allowance (possibly including housing expenses) subtracted from her income before a cost share is computed. 42 C.F.R. §435.726; Wis. Admin. Code §DHS 103.07(1)(d). Remedial expenses are defined in the *MEH*:

Remedial expenses are costs incurred for services or goods that are provided for the purpose of relieving, remedying, or reducing a medical or health condition. These are expenses that are the responsibility of the member and cannot be reimbursable by any other source, such as Medicaid, private insurance, or employer.

Some examples of remedial expenses are:

1. Case management.
2. Day care.
3. Housing modifications for accessibility.
4. Respite care.
5. Supportive home care.
6. Transportation.
7. Services recognized under s.46.27, Wis. Stats.
8. Community Options Program, that are included in the person's service plan.

MEH, §15.7.3.

The issue is whether the neuromuscular massage services the petitioner pays for meet the definition of a remedial expense, specifically whether these services are “reimbursable by any other source, such as Medicaid, private insurance, or employer.” The agency representatives at hearing agreed that the massage therapy can be covered under the FCP. Therefore, the agency reasons, because the massage services are a covered benefit in the FCP package the petitioner cannot use them as a remedial expense. In determining that the cost of the massage therapy is not a remedial expense, the agency relies on a Milwaukee County Department of Family Care Policy, entitled “Medical Remedial Expenses” with an Original Issuance date of 11/24/10 and Revision date of 10/13/11. “Remedial Expenses” are defined therein as “costs incurred for services or goods that are provided for the purpose of relieving, remedying, or reducing a medical or health condition.” *Id.* The Policy indicates that “If an item can be covered in the Family Care benefit package it is *not* a remedial expense. If an item is identified as necessary to meet a member [sic] outcome, Milwaukee County Family Care (MCFC) should provide it.” *Id.*

What happened here is that the agency determined it was no longer going to credit her for the massage costs by including it as a remedial expense effective November 1, 2013. It issued a notice then stating that her cost share would increase. What it did not do is notify her that it also determined that even though it is covered in the FCP package, they were not going to offer it as a service to her. According to the testimony the FCP determined that the massage was not medically necessary for her. The agency did not provide any evidence of what petitioner’s outcomes are, but testified that the massage would not meet the outcomes. When asked when that determination was made, the FCP representatives could only offer a conversation they had had with a medical assistant at petitioner’s neurologist’s office who said it was not medically necessary, and because it would not meet her outcomes; this conversation happened two days prior to the instant hearing. When asked if any notice of that determination was issued to the petitioner, the answer was “no because the petitioner never asked for the service.” This does not make sense when the agency took it upon themselves to determine whether or not they would cover it. The agency is required to issue such a notice “in every instance in which the CMO intends to reduce or terminate a service or deny payment for a service.” Wis. Adm. Code §DHS 10.52(3)(b)2.

The first thing I address is the issue of timeliness. The notices advising her of her increased cost share were not appealed within the 45 day requirement. There is no jurisdiction if a hearing request is untimely as an appeal of a negative action by a county agency concerning AFDC or MA must be filed within 45 days of the date of the action. Wis. Stat. §49.45(5); Income Maintenance Manual, §3.2.2. However, when a notice is misleading, confusing, and unintelligible it is inadequate. See, Dilda v. Quern, 612 F.2d 1055 (7th Cir. 1980); see also, Goldberg v. Kelly, 397 U.S. 254, 267-8, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) and Ortiz v. Eichler, 616 F.Supp. 1046, at 1061-62 (D.Del.1985). The notices advising petitioner as to her cost share are inadequate for her to have known that the FCP also was not going to fund the service. Those notices do not discuss remedial expenses or massage therapy as a service being denied. Accordingly, I find these notices inadequate to advise her of the ultimate negative action taken here, and therefore find the appeal is timely as a matter of law.

Secondly, the only direct, nonhearsay evidence I have demonstrates that the petitioner’s health condition makes it important for her to have the monthly massages. The agency has the burden to show that the service does not meet her outcomes or that it was not medically necessary. They did not offer any nonhearsay nonconclusory evidence to support that. However, in the end, the agency has determined that the costs petitioner incurs for the massage is now not a covered benefit of the FCP for her. Therefore, it meets the definition of a remedial expense and must be considered as such in determining the petitioner’s cost share.

CONCLUSIONS OF LAW

The petitioner’s out-of-pocket expenses for massage therapy meet the definition of remedial expenses that must be considered in determining the petitioner’s cost share.

THEREFORE, it is

ORDERED

That this matter is remanded to the agency to take all administrative steps necessary to recalculate petitioner's cost share considering the petitioner's out-of-pocket remedial expense for massage therapy. This action shall be taken within 10 days of the date of this decision. The matter is further remanded to the FCP agency to reimburse petitioner any cost share overages she paid effective November 1, 2013. The agency shall take this action within 20 days of this decision.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 27th day of May, 2014

\sKelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on May 27, 2014.

Milwaukee Enrollment Services
Office of Family Care Expansion